UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

Plaintiff,

-against-

MEMORANDUM
AND ORDER
96-CV-374 (RML)

NEW YORK CITY BOARD OF EDUCATION; CITY OF NEW YORK, WILLIAM J. DIAMOND, Commissioner, New York City Department of Citywide Administrative Services (in his official capacity); and NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES,

Defendants.
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A P P E A R A N C E S:

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LEVY, United States Magistrate Judge:

By Notice of Motion dated February 18, 2000, defendants move for approval of their proposal (the "Proposed Alternative Use") to reduce the adverse impact of

Custodian96cv374mo.pdf Engineer (BOE) Examination # 7004 (the "7004 Exam"). For the reasons stated below, the Proposed Alternative Use is approved.

Background and Procedural History

In February of this year, this court issued a Memorandum and Order approving the settlement of this action. See United States v. New York City Bd. of Educ., 85 F. Supp. 2d 130, 136 (E.D.N.Y. 2000).[1] Familiarity with that decision is assumed. Briefly, however, the United States filed this action in January 1996 alleging that defendants (1) failed and/or refused to recruit blacks, Hispanics, Asians, and women on the same basis as white, non-Hispanic men for the positions of Custodian and Custodian Engineer; (2) failed and/or refused to hire and promote blacks and Hispanics on the same basis as whites for the positions of Custodian and Custodian Engineer; and (3) used entry-level and promotional written examinations for the positions of Custodian and Custodian Engineer that disproportionately excluded blacks and Hispanics from employment and have not been shown to meet the requirements of federal law. Defendants denied all of the allegations and, after engaging in a long and often contentious discovery process, the parties negotiated and executed a Settlement Agreement in February 1999 (the "Settlement Agreement").

The Settlement Agreement resolved all of the issues that were or could have been raised by the United States in its complaint. Its provisions are too numerous and extensive to recount in detail here, but in essence the settlement concerned three civil service examinations for the positions of school Custodian and Custodian Engineer that were given between 1985 and

[1] By stipulation dated June 2, 1999, the parties consented to have this case referred to a Magistrate Judge for all purposes. See 28 U.S.C. § 636(c).

1993. See New York City Bd. of Educ., 85 F. Supp. 2d at 135-36. The Settlement Agreement prohibits defendants from discriminating on the basis of race, national origin, or gender in the recruitment or selection of any employee, applicant or prospective applicant for the positions of Custodian and Custodian Engineer with the New York City Board of Education, and it requires defendants to implement a comprehensive recruitment program to increase the numbers of qualified black, Hispanic, Asian, and female applicants for those positions. Id. at 135. It also prohibits defendants from using the written examinations challenged in the lawsuit again and states that if defendants develop any new written examinations before February 2003, they are to consult with the United States' designated expert and comply with the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607, *et seq.* (1998). Id. at 136.

Included in the Settlement Agreement is a provision stating that

> [d]efendants will consult with an expert to be designated by the United States on ways to attempt to reduce any adverse impact of [the 7004 Exam] through any means that complies with federal law. Accordingly, Defendants shall not establish an eligible list from [the 7004 Exam] until this consultation effort has been completed.

(Settlement Agreement ¶ 26.) Pursuant to this provision, defendants were required to consult with an expert designated by the United States on ways to reduce any adverse impact of the 7004 Exam, which was given in 1997, but the results of which have not yet been used to select applicants for Custodian Engineer positions.

After conferring with plaintiff's expert and devising the Proposed Alternative Use for the 7004 Exam results, defendants asked the court to schedule a Fairness Hearing and sent notice of the scheduled hearing to all interested parties, inviting objections from those whose interests might be adversely affected. (Declaration of Norma A. Cote, dated April 19, 2000

("Cote Decl."), ¶ 2; Declaration of Joseph Boswell, dated April 19, 2000, ¶ 2.)[2] Defendants received approximately 134 written objections,[3] as well as 23 identical form petitions with numerous signatories opposing the Proposed Alternative Use. (Id. ¶ 5.) A Fairness Hearing was then held on April 26, 2000 to consider those objections and hear counsel's arguments. (See Transcript of Hearing, dated April 26, 2000.) This Memorandum and Order addresses the remaining issue in this case, namely the fairness and reasonableness of the Proposed Alternative Use for the results of the 7004 Exam.

Adverse Impact of the 7004 Exam

Defendants developed the 7004 Exam and administered it in December 1997, long before the parties reached a settlement in this case. As an initial matter, anyone seeking to take the exam was required to submit proof of education and experience in order to satisfy the minimum qualifications for the Custodian Engineer position. (See Notice of Examination, annexed as Exhibit A to the Declaration of Carol Wachter, dated February 18, 2000 ("Wachter Decl.").) The exam consisted of two separate written test batteries, both administered to test takers on the same day: (1) an 80-question multiple-choice cognitive test (the "competitive test"), and (2) a 40-question multiple-choice practical test (the "practical test"). (See Wachter Decl. ¶

[2] Notice of the Fairness Hearing and defendants' Notice of Motion were posted in the headquarters of the Office of Building Services for the New York City Board of Education, as well as in the three borough offices (Declaration of James Lonergan, dated April 19, 2000, ¶ 2), and in the offices of the Board of Education's Division of Human Resources. (Declaration of Thomas Seluga, dated April 29, 2000, ¶ 2.) In addition, copies were supplied to the union representing school Custodians and Custodial Engineers (id.), which did not file an objection (Cote Decl. ¶ 14), and were posted on the internet web site of the Board of Education and the New York City Department of Citywide Administrative Services. (Id. ¶ 3.)

[3] This includes two objections that were postmarked after the March 29, 2000 deadline. (Cote Decl. ¶ 5.)

3.) Defendants originally intended to set minimum pass marks of seventy percent for both the competitive test and the practical test, and then to establish an "eligibility list" of minimally qualified test takers who passed the practical test, in descending rank order based on their scores on the competitive test, adjusted for veterans' credits where applicable. (Wachter Decl. ¶ 3 and Exhibit A; Lonergan Decl. ¶ 4.) In other words, defendants' normal practice would be to select candidates for the Custodian Engineer position in top-down fashion off of a rank-order eligibility list.

As explained, the Settlement Agreement required the United States and defendants to work together to ameliorate any disparate impact the 7004 Exam might have on black and Hispanic test takers. Specifically, the United States agreed not to challenge the 7004 Exam under Title VII in a separate lawsuit, and in exchange defendants agreed to engage in good faith, meaningful consultation with the United States and its experts to reduce any unlawful adverse impact caused by the 7004 Exam. (See Settlement Agreement ¶ 26.)

Pursuant to that part of the Settlement Agreement, defendants provided substantial information to the United States regarding the 7004 Exam, including job analyses and test results. The United States' designated experts then reviewed the exam results and various proposed alternative uses of those results. The experts concluded that the 7004 Exam would have a statistically significant adverse impact on minimally qualified blacks and Hispanics if selection for Custodian Engineer positions were made on a descending rank-order basis.[4]

[4] As explained in my previous decision, it is well-settled that a *prima facie* showing of adverse racial impact "may be established by statistical evidence showing that an employment practice has the effect of denying the members of one race equal access to employment opportunities." New York Transit Auth. v. Beazer, 440 U.S. 568, 584 (1979). See also Albemarle v. Moody, 422 U.S. 405, 425 (1975) (*prima facie* case of adverse impact established

Specifically, plaintiff's statistics expert, Dr. Bernard Siskin,[5] analyzed the extent to which the 7004 Exam has a disparate impact on the basis of race or national origin by measuring the difference in the pass rates of white test takers versus those of black and Hispanic test takers. (Declaration of Bernard R. Siskin, Ph.D., dated March 2, 2000, ¶ 4.) As Dr. Siskin explains in his

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by proof "that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants"); Bushey v. New York State Civil Serv. Comm'n, 733 F.2d 220, 227 (2d Cir. 1984) ("'a prima facie case of employment discrimination through a statistical demonstration of disproportionate racial impact constitutes a sufficiently serious claim of discrimination to serve as a predicate for voluntary compromise containing race-conscious remedies'") (quoting Kirkland v. New York State Dep't of Correctional Servs., 711 F.2d 1117, 1130 (2d Cir. 1983); Guardians Ass'n of New York City Police Dep't, Inc. v. Civil Serv. Comm'n, 630 F.2d 79, 88 (2d Cir. 1980) ("statistics showing a significantly disparate racial impact have consistently been held to create a presumption of Title VII discrimination"); United States v. County of Fairfax, 629 F.2d 932, 939 (4th Cir. 1980) ("statistics can establish a *prima facie* case [in a disparate treatment case], even without a showing of specific instances of overt discrimination"); Vulcan Soc'y of the New York City Fire Dep't, Inc. v. Civil Serv. Comm'n of the City of New York, 490 F.2d 387, 392-93 (2d Cir. 1973)(upholding district court's finding of adverse impact by comparing test passing rates of minority and non-minority candidates); Green v. Town of Hamden, 73 F. Supp.2d 192, 197-98 (D. Conn. 1999) (finding a *prima facie* case of disparate impact based on statistics showing a significant disparity in examination pass rates between minorities and non-minorities). There is no requirement that plaintiff prove that the tests were intentionally discriminatory or non-job-related in order to receive judicial approval of a settlement. Reid v. State of New York, 570 F. Supp. 1003, 1006 (S.D.N.Y. 1983).

[5] Dr. Siskin is a Senior Vice President of the Center for Forensic Economic Studies, Inc. in Philadelphia, Pennsylvania. He received his Ph.D. in Statistics, with a minor in Economics, from the Wharton School of the University of Pennsylvania in 1970. He has authored books on statistical methodology, as well as numerous articles and papers on the role of statistics in the analysis of employment discrimination issues, and he specializes in the application of statistics to the analysis of employment practices. In his capacity as a statistics expert, he has been retained to render opinions to numerous governmental and private organizations, including the Third Circuit Task Force on Race and Gender, the Equal Employment Opportunity Commission, the Office of Federal Contract Compliance Programs, and the Federal Bureau of Investigation. (Siskin Decl. ¶ 1 and attached Biographical History.) He is therefore qualified to opine on the statistical matters at issue in this case.

The findings of defendants' expert, Dr. Catherine S. Cline, are nearly identical to Dr. Siskin's. (See Declaration of Catherine S. Cline, Ph.D., dated February 7, 2000.)

uncontested declaration, a test is ordinarily deemed to have a disparate impact if the disparity in pass rates is statistically significant. (Id.) A disparity is considered statistically significant if the likelihood of such a disparity occurring by chance is less than one in twenty, or .05. (Id. ¶ 5.) As an alternative to probability values, Dr. Siskin explained that one can express the difference in pass rates in units of standard deviation.[6] Thus, a disparity that has a .05 probability of occurring by chance represents a disparity of 1.96 units of standard deviation. (Id. ¶ 5, n. 6.) The higher the standard deviation, the smaller the probability that the difference is due to chance alone. In other words, if a disparity is statistically significant, then one can reasonably conclude that the test has a negative impact on minorities. (Id. ¶ 5.)

It is undisputed that the following pass rates apply for the 7004 Exam:[7]

Competitive Test

	Total	Passed[8]	Failed	Pass Rate	Percent of White Pass Rate	Disparity with Whites in Units of Standard Deviation
White	493	470	23	95.3	-----	-----
Black	73	52	21	71.2	74.7	6.94
Hispanic	121	103	118	85.1	89.3	4.32

[6] As explained in my previous Memorandum and Order, the standard deviation for a particular set of data provides a measure of how much the particular results of that data differ from the expected results. In other words, the standard deviation is a measure of the average variance of the sample, that is, the amount by which each item deviates from the mean. The number of standard deviations by which the actual results differ from the expected results can be compared to the normal distribution curve, yielding the likelihood that the difference would have been the result of chance. Guardians Ass'n, 630 F.2d at 86 n.4.

[7] See Siskin Decl., Tables 1, 2, and 3. See also Declaration of Catherine S. Cline, Ph.D., dated February 7, 2000, ¶ 6).

[8] Scoring at least sixty percent.

Practical Test

	Total	Passed[9]	Failed	Pass Rate	Percent of White Pass Rate	Disparity with Whites in Units of Standard Deviation
White	489	408	81	83.4	------	--------
Black	73	41	32	56.2	67.4	5.27
Hispanic	118	95	23	80.5	96.5	0.62

Bottom Line Pass/Fail Impact

	Total	Passed	Failed	Pass Rate	Percent of White Pass Rate	Disparity with Whites in Units of Standard Deviation
White	489	401	88	82.0	------	------
Black	73	38	35	52.1	63.5	5.62
Hispanic	120	87	33	72.5	88.4	2.21

In analyzing the data provided by defendants concerning the pass rates of whites versus the pass rates of blacks and Hispanics on the 7004 Exam, Dr. Siskin concluded that the exam has a "highly statistically significant" impact on blacks (id. ¶11) and a "statistically significant adverse impact" on Hispanics. (Id. ¶ 10.) For black test takers, the disparate impact occurs with both the competitive test and the practical multiple choice test. (Id. ¶ 9.) For Hispanic test takers, the disparate impact is wholly attributable to the competitive test. (Id. ¶ 12.)

In addition to analyzing the overall adverse impact on pass rates, Dr. Siskin analyzed the impact of the rank-order use of the 7004 Exam. As explained, defendants' regular

[9] Scoring at least seventy percent.

practice would be to place those who pass both the competitive and practical tests on a rank-order eligibility list based on their scores on the competitive test. Thus, not all candidates who pass the exam will necessarily be hired; rather, candidates are hired in order of their scores and a particular candidate's selection for an available position depends on having a sufficiently high score on the competitive test. (Id. ¶ 19.) Moreover, even if the rank-order list is eventually exhausted, those who scored lower will have to wait longer to be selected than those who scored higher on the competitive test. (Id. ¶ 20.)

To measure the impact of the exam based on actual competitive test scores, Dr. Siskin conducted two analyses. First, he determined the extent to which black and Hispanic passers were disproportionately clustered among the lower-scoring passers of the competitive test by comparing the average scores of the three identified groups. (Id.) He found that the average score for white passers was 82.65, while the average scores for black and Hispanic passers were 74.65 and 78.38 respectively. (Id.) The difference between the average scores of white and black passers represents a disparity of 5.58 units of standard deviation, and the difference between the average scores of white and Hispanic passers represents a disparity of 4.02 units of standard deviation. (Id.) According to Dr. Siskin, both disparities are "highly statistically significant." (Id.)

Second, Dr. Siskin divided the 544 test passers into five groups of approximately equal size, based upon the distribution of competitive test scores and accounting for the number of ties at particular scores. (Id.) He found that approximately forty-seven percent of black passers and thirty-seven percent of Hispanic passers ranked in the bottom category of all test passers. The following tables show the distribution:

Test Passers - Raw Numbers

Rank	White	Black	Hispanic
1-104 (minimum score of 91.139)	87	1	13
105-209 (minimum score of 86.075)	89	4	10
210-316 (minimum score of 81.012)	79	7	15
317-422 (minimum score of 74.683)	78	8	17
423-544	68	18	32
TOTAL	401	38	87

Test Passers - Percent

Rank	White	Black	Hispanic
1-104	21.7	2.6	14.9
105-209	22.2	10.5	11.5
210-316	19.7	18.4	17.2
317-422	19.5	21.1	19.5
423-544	17.0	47.4	36.8

Likelihood of Being at or Above Rank Compared to Whites

Rank	Black	Hispanic
1-104	12.0%	68.7%
105-209	30.1	60.1
210-316	49.7	68.7

317-422	63.4	76.1
423-544	100	100

These statistics show that blacks and Hispanics are clustered at the bottom of the rank-order eligibility list. (Id.) As Dr. Siskin points out, it is impossible to determine the true pass-fail impact of the competitive test, since no one can predict exactly how many job selections ultimately will be made from the list. However, Dr. Siskin did calculate what the true impact would be if various scores were reached during the life of a rank-order eligibility list. The following tables show the results for various "cutoff" scores based on the use of the actual competitive exam scores:

Raw Numbers

Rank Reached	White	Black	Hispanic
104	87	1	13
209	176	5	23
316	255	12	38
422	333	20	55
544	401	38	87

Disparity vs. Whites in Units of Standard Deviation

Rank Reached	Blacks	Hispanics
104	3.43	1.71
209	4.84	3.41
316	5.57	3.92

422	6.58	4.44
544	5.62	2.21

Thus, for example, if 422 out of the 544 qualified candidates were to be selected for Custodian Engineer positions off of a rank-order eligibility list, the practical pass rate for blacks would be 40.2 percent that of whites, and the practical pass rate for Hispanics would be 67.3 percent that of whites. (Id. ¶ 21.) The disparities increase if fewer candidates are hired off of the list. (Id.)

The Proposed Alternative Use

The Proposed Alternative Use of the 7004 Exam results is to lower the pass mark on the competitive test from seventy percent to sixty percent,[10] and to rank the 544 nominal test passers based on a random lottery, instead of on a rank-order basis. (Declaration of James Lonergan, dated April 19, 2000, ¶ 4.) The parties expect that the randomized ordering of minimally-qualified passers will lessen the disparate impact of the exam by preventing blacks and Hispanics from being clustered near the bottom of the eligibility list. (Siskin Decl. ¶ 22.) In other words, if blacks and Hispanics are distributed randomly throughout an eligibility list, they are more likely to be selected for Custodian Engineer positions than if defendants selected candidates

[10] The decision to lower the pass mark from seventy percent to sixty percent was apparently made independent of the need to reduce the disparate impact of the exam. As Carol Wachter, Assistant Commissioner of the Bureau of Examinations of the New York City Department of Citywide Administrative Services, explains in her declaration, after the tests were scored, it appeared that the 7004 Examination would yield approximately 460 eligibles. (Wachter Decl. ¶ 4.) This appeared too few to meet the needs of the Board of Education in filling vacancies over the life of the list, which could run for a maximum of four years under state law. (Id.) Accordingly, the Bureau of Examinations conferred with the Board of Education and concluded that the pass mark on the competitive test could safely be lowered to sixty percent without going below the minimum level of competence necessary to perform the job. (Id. ¶ 5.)

using a rank-order eligibility list.

Indeed, defendants have conducted a lottery to create a random order list of exam passers that bears out these expectations. Using the random order list,[11] the distribution is as follows:

Raw Numbers

Rank Reached	White	Black	Hispanic
104	75	9	18
209	149	22	34
316	221	31	54
422	301	35	71
544	401	38	87

Disparity vs. Whites in Units of Standard Deviation

Rank Reached	Black	Hispanic
104	0.50	0.00
209	0.00	0.35

[11] The randomizing was done by computer and was carried out by means of two electronic files. First, the computer was given an electronic file consisting of all individuals who applied to take the test, and it sorted those individuals randomly. Then the computer was given an existing electronic file of numbers that had been generated randomly by computer. The computer then assigned the first randomly generated number to the applicant who was first on the randomized list of those who had actually taken the test. It assigned the second randomly generated number to the second applicant on the list who had taken the test, and so on until every test-taker had been assigned a random number. (Declaration of Thomas J. Patitucci, dated April 21, 2000, ¶ 2). Thus, every test-taker -- both passers and failers -- was assigned a random number. If by some mistake a test passer was marked not qualified but later obtained a reversal of that designation, he or she would then be placed back on the list in the same position the person would have occupied had he or she initially been marked qualified. (Id. ¶ 3.)

316	0.31	0.00
422	2.08	0.38
544	5.62	2.21

(Siskin Decl., Table 7.)

The random order list does not totally eliminate the adverse impact of the exam, but it does reduce that impact appreciably. Through rank 209, the use of a randomized list totally eliminates the adverse impact on both blacks and Hispanics. (Id. ¶¶ 22, 23.) Through rank 422, the use of a randomized list eliminates the adverse impact on Hispanics completely and reduces the impact on blacks to 2.08 units of standard deviation, as compared with the 6.58 units of standard deviation for the rank-order eligibility list. (Id.) In real numbers, if 422 eligibles are selected off the randomized list, 35 black applicants will receive jobs, as compared with 20 using the rank-order list. For Hispanics, the number will increase from 55 to 71.

Moreover, although the random order list does not eliminate the adverse impact of the exam totally, the randomized redistribution of the scores produces a final distribution that gives no statistical advantage to any specific racial or ethic group or gender. (Declaration of Catherine S. Cline, dated April 18, 2000, ¶ 7.) In other words, the proposal does not create any racially or ethnically-based classifications but rather treats all races and ethnic groups even-handedly.

Other Alternatives

The United States does not object to the Proposed Alternative Use since it complies with defendants' obligation under the Settlement Agreement to consult with plaintiff's

expert to "attempt to reduce any adverse impact" of the exam. (Settlement Agreement ¶ 26.) Before settling on this proposal, however, the parties considered a number of other alternative uses of the 7004 Exam results. First, the United States proposed that defendants essentially abandon the test results altogether and instead randomly select from among *all* 7004 Exam takers using a validated, structured interview system to measure management, interpersonal, and other key job attributes required for effective performance as a Custodian Engineer. Defendants rejected this proposal on the ground that abandoning the 7004 Exam results would cause undue delay and hardship. According to defendants, there has not been an eligible list for the title of Custodian Engineer since February 1994, and there are currently over eighty vacancies for those positions. (Lonergan Decl. ¶ 17.) Moreover, when a civil service list is created from the 7004 Exam, some individuals who are currently serving as Custodians will be able to move directly into the position of Custodian Engineer and begin to accrue seniority in that title. There are apparently now fifty to sixty Custodians who have the requisite licenses and qualifications to become Custodian Engineers, and most of them are working provisionally in those jobs. (Id. ¶ 20.) Those individuals cannot start to accrue seniority in that title until they receive permanent appointments as Custodian Engineers, which cannot occur until a civil service list is created. (Id.)[12] This proposal would also no doubt prompt vehement protests from individuals who passed

[12] I note, however, that permanent Custodians who took the 7004 Exam will not be personally affected by the manner in which the eligible list from that exam is constructed, because their advancement to the position of Custodian Engineer will not depend on their being called from the eligible list from that exam. On March 19, 1997, the New York City Department of Citywide Administrative Services adopted a resolution reclassifying the titles of Custodian and Custodian Engineer into a single title called Custodian Engineer (BOE). (Cote Decl. ¶ 10.) The new title has two levels, Level I and Level II, which correspond to the present titles of Custodian and Custodian Engineer. (Id.) This reclassification will be implemented with the establishment of the first civil service list for the new title, and the 7004 Exam was intended to supply that list.

the exam after conscientious and time-consuming study and whose efforts would have been wholly for naught.

The United States then proposed that defendants hire blacks, Hispanics, and all other test takers in descending rank-order fashion from the eligibility list based on their competitive test scores within each racial group and according to the proportion of their overall representations in the test taker pool. In other words, if Hispanics comprised ten percent of all test takers, then each time defendants intended to select a group of test takers off of the 7004 Exam eligibility list, ten percent of that group would consist of the then-highest-scoring Hispanics on the list. Defendants rejected this proposal on the ground that it would establish racial "quotas" and would require hiring minority test-takers who failed the exam.

In exploring ways to use the 7004 Exam while reducing the adverse impact on minorities, the parties also considered whether it might be possible to group the applicants' scores into bands, whereby all scorers within a particular band would be treated as equally qualified, but rank order would be preserved to some degree by the score-based hierarchy of the bands themselves. (Further Declaration of Carol Wachter, dated April 24, 2000, ¶ 4.) Upon further review, however, the experts concluded that the creation of bands would not have any effect on disparate impact. (Id.)

Discussion

The proposal to randomize the 7004 Exam results arises under and implements a

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(Id.) Once the reclassification is implemented, someone who is now a permanent Custodian will automatically become a Custodian Engineer (BOE) Level I and will be able to advance to Level II merely by obtaining the required licenses or other qualifications, without having to take another civil service test. (Id. ¶ 11.)

settlement agreement entered into pursuant to Title VII, 42 U.S.C. § 2000e. It therefore must be evaluated pursuant to the standard of review for approval of a settlement of a Title VII case. As explained in my previous Memorandum and Order, the applicable standard is whether the proposed agreement is lawful, fair, reasonable, adequate, and consistent with the public interest. New York City Bd. of Educ., 85 F. Supp.2d at 136 (citing EEOC v. Hiram Walker & Sons, Inc., 768 F.2d 884, 889 (7th Cir. 1985); Vulcan Soc'y of the New York City Fire Dep't, Inc. v. City of New York, 96 F.R.D. 626, 629 (S.D.N.Y. 1983)). The court has considerable discretion in determining whether to approve a settlement (see City of Detroit v. Grinnell Corp., 495 F.2d 448, 454 (2d Cir. 1974); Newman v. Stein, 464 F.2d 689, 692-93 (2d Cir. 1972)), but must bear in mind the general preference for cooperation and voluntary compliance as a means of ensuring equal employment opportunities and eliminating discriminatory practices. See Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 515 (1986); Carson v. American Brands, Inc., 450 U.S. 79, 88 n.14 (1981); Hiram Walker & Sons, 768 F.2d at 888-89; Kirkland v. New York State Dep't of Correctional Servs., 711 F.2d 1117, 1128 (2d Cir. 1983).

Indeed, as noted in my decision approving the underlying settlement in this case, voluntary settlements in Title VII cases enjoy a "presumption of validity" that can be overcome "only if the decree contains provisions which are unreasonable, illegal, unconstitutional, or against public policy." United States v. New York City Bd. of Educ., 85 F. Supp.2d at 137 (quoting United States v. City of Alexandria, 614 F.2d 1358, 1362 (5th Cir. 1980), and citing Berkman v. City of New York, 705 F.2d 584, 597 (2d Cir.1983); Reid v. State of New York, 570 F. Supp. 1003, 1004 (S.D.N.Y. 1983)). This presumption is especially strong when the consensual agreement at issue has been reached by a federal government agency charged with protecting the

public interest and seeing that anti-discrimination laws are enforced and violations remedied. Id. (citing United States v. City of Miami, 614 F.2d 1322, 1332-33 (5th Cir. 1980)).

Because of the strong public policy favoring voluntary settlements in Title VII cases, the Proposed Alternative Use is presumptively reasonable and those objecting to the proposal have "'a heavy burden of demonstrating that the [agreement] is unreasonable.'" Id. (quoting Williams v. Vukovich, 720 F.2d 909, 921 (6th Cir. 1983)).

Here, the proposed randomization process fully complies with Title VII and other federal anti-discrimination laws. Randomly selecting test-takers above a minimum pass mark is a sound and lawful alternative to hiring in rank order when the rank-order selection process is shown to have a significant disparate impact on minorities. See Guardians Ass'n, 630 F.2d at 104-05 (employer that cannot justify rank-order hiring may resort to random selection from a group of test takers who achieve a properly determined passing score in order to reduce disparate impact); Kirkland, 552 F. Supp. at 670 (approving settlement agreement providing for random ordering of all qualified candidates in properly-justified score bands).

Although the Proposed Alternative Use does not provide complete satisfaction to everyone it affects, this by itself does not render the proposal "unreasonable." See EEOC v. New York Times Co., 92 Civ. 6548, 1995 WL 135577, at *4 (S.D.N.Y. Mar. 29, 1995). Rather, proposed remedies that are voluntarily entered into need only be "substantially related" to eliminating the alleged disparate impact without "'unnecessarily trammel[ing] the interests of affected third parties.'" Id. (quoting Kirkland, 711 F.2d at 1132). In this case, it is beyond doubt that the Proposed Alternative Use is substantially related to eliminating discrimination in the hiring for Custodian Engineer positions. In addition, as explained in my decision approving the

underlying settlement, "employees 'do not have a legally protected interest in the mere expectation of appointments which could only be made pursuant to presumptively discriminatory practices,'" and a person on an eligibility list "'does not possess any mandated right to appointment or any other legally protectable interest.'" New York City Bd. of Educ., 85 F. Supp.2d at 152 (quoting Kirkland, 711 F.2d at 1126, 1134). Accordingly, and as discussed in more detail below, the Proposed Alternative Use will not unnecessarily trammel the interests of affected third parties.

The Objections

As explained, defendants received 134 objections to the Proposed Alternative Use. (Cote Decl. ¶ 5.) Of those objectors, 22 did not take the 7004 Exam (id. ¶ 6) and another 29 objectors took the exam but either failed or did not meet the minimum education and experience requirements, or both. (Id. ¶ 7.) These objectors will not be personally affected by the proposed randomization of the list. The remaining 83 objectors constitute approximately fifteen percent of the 544 individuals who are on the eligible list for the 7004 Exam. I have carefully reviewed their objections, which fall roughly into the following categories:

(1) objections based on safety concerns; (2) objections based on the perceived unfairness to whites or to members of minority groups; (3) objections based on the civil service law; and (4) objections complaining of loss of veterans' credits. Each category will be addressed in turn:

A. Safety Concerns

Numerous objectors raise concerns that randomization of the eligible list will result in the placement of incompetent Custodial Engineers and will imperil the safety of schoolchildren, teachers, staff, and the public. Having reviewed the proposal and the evidence thoroughly, I find

that implementing the Proposed Alternative Use will not compromise safety in the schools or result in the placement of incompetent persons in the position of Custodian Engineer.

As an initial matter, everyone on the random-ordered eligibility list will have passed both parts of the examination, with a minimum score of seventy percent on the practical test. (Lonergan Decl. ¶ 5.) The practical test was devoted entirely to questions about the types of equipment that raise the greatest concerns about safety, namely heating and ventilation systems, sewage disposal systems, electrical distribution systems, and plant maintenance. (Id.) As James Lonergan, Senior Director of Building Services for the New York City Board of Education, points out, the practical test "was always slated to be graded on a pass/fail basis; i.e., a candidate's score here did not determine his [or her] rank on the eligible list." (Id.)[13] Since scores from this test were never intended for ranking, it will not be affected by randomization.

Moreover, lowering the pass mark on the competitive test from seventy percent to sixty percent will not lower hiring standards below the minimum competency level needed to perform the job of Custodian Engineer. (Id. ¶ 6.) As Mr. Lonergan explains in his uncontested declaration, the pass mark of seventy percent on the competitive test "was a product of convention rather than a determination of the minimum competency level." (Id.) In addition, the Board of Education has at times hired as provisional Custodian Engineers individuals who scored below seventy percent on past examinations. According to Mr. Lonergan, those individuals have been able to perform the job, and in fact, some of those provisional employees are among the

[13] This court has not received evidence on the issue of whether the 7004 Exam is job-related or valid, and has not been required to evaluate the exam substantively within the context of the settlement. However, accepting as true the contention that the practical test is designed to test a candidate's knowledge of safety measures, randomizing the eligible list of test passers will not undermine that objective.

"better performers, judging by plant managers' and principals' ratings." (Id.)

Most importantly, every test taker must meet minimum experience and education requirements in order to be placed on the eligible list. (Id. ¶ 9.) Where a specific vacancy requires a specialized license or certification to operate the equipment there, no person can be appointed to fill that vacancy without having the requisite license or certification. (Id. ¶ 10.) Finally, before being hired permanently, each person is interviewed by a team of three staff members from the Division of School Facilities, which evaluates the person's knowledge, skills, abilities, and background, and all new hires must go through a one-year probationary period, during which they are closely supervised. (Id. ¶¶ 12, 14.) Anyone who proves incapable of performing the job is dismissed during that period. (Id.) Given all of these checks and controls, this court finds it extremely unlikely that lowering the pass mark on the competitive test to sixty percent and randomizing the eligibility list will have any ramifications for safety or competence.

B. Perceived Unfairness

Many objectors argue that the Proposed Alternative Use results in reverse discrimination against whites and grants minorities special privileges. At the same time, several minority objectors complain that their rankings were reduced by the randomizing process. Most striking is the situation of Gerardo Gutierrez, Jr., a Hispanic male who achieved the highest score on the 7004 Exam and whose rank order was reduced from number one to number 156 though the randomization process. Both whites and minorities who have been assigned lower rankings than they would have had under the rank-order selection process complain that randomization does not properly account for the sacrifices they made in preparing and studying for the 7004 Exam.

Contrary to the claims of objectors complaining that the Proposed Alternative Use is an end-run attempt to establish a racial quota system, apply racial classifications, or otherwise favor minorities, randomizing treats all races and ethnic groups the same. It is a race-neutral selection process, since all passers have the identical probability of being placed high or low on the list and there is no minimum required number or percentage of minority appointments under the proposal. Although defendants were necessarily conscious of race and ethnicity and formulated the proposal with the goal of lessening the exam's discriminatory impact, the result is facially neutral and treats all test-passers uniformly, regardless of race or ethnicity. See Hayden v. County of Nassau, 180 F.3d 42, 49-50 (2d Cir. 1999) (a desire to reduce disparate impact on minorities by redesigning an examination does not constitute a racial classification or amount to reverse discrimination where the exam is administered and scored the same way for all applicants).

Moreover, even if the Proposed Alternative Use were deemed to constitute "race-conscious relief," such relief is indisputably appropriate to remedy past discrimination. Wygant v. Jackson Board of Ed., 476 U.S. 267, 277 (1986). As explained in my Memorandum and Order approving the underlying settlement, a court evaluating the relief afforded victims of discrimination under a settlement agreement must be guided by one of the central purposes of Title VII, that is "'. . . to make persons whole for injuries suffered on account of unlawful employment discrimination.'" United States v. New York City Bd. of Educ., 85 F. Supp. 2d at 146 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975), and citing Clarke v. Frank, No. 88 CV 1900, 1991WL 99211, at*2 (E.D.N.Y. May 17, 1991)). To achieve this purpose, "Congress took care to arm the courts with full equitable powers" so that "'[t]he injured part[ies] . . .[shall] be placed, as near as may be, in the situation [they] would have occupied if the

wrong had not been committed.'" Albemarle Paper Co., 422 U.S. at 418-19 (quoting Wicker v. Hoppock, 6 Wall. 94, 99 (1867)). Specifically, the Supreme Court has held that a court's "broad equitable discretion" to effectuate Title VII's "make whole" objective includes the authority to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, . . . or any other equitable relief as the court deems appropriate." Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976) (citation omitted). In fact, the court "'has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'" Albemarle Paper Co., 422 U.S. at 418 (quoting Louisiana v. United States, 380 U.S. 145, 154 (1965)).

In this case, it is without question that the 7004 Exam would have a disparate impact on blacks and Hispanics if the results were used in rank order. This proposal minimizes that disparate impact significantly and is therefore reasonable, lawful, and consistent with the public interest. As discussed, the result would have been lawful even if it explicitly took race into account.

As for members of minority groups and others who will receive lower rankings as a result of randomization, it is indeed unfortunate that the proposed solution "cannot fully succeed without affecting and, to some degree, frustrating the expectations of people who have no personal responsibility for the wrongs sought to be corrected." Vulcan Soc'y, 96 F.R.D. at 631. Nonetheless, as the United States Supreme Court has explained, denying relief to protected classes "on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees would if applied generally frustrate the central 'make whole' objective of

Title VII." Franks, 424 U.S. at 774. The government maintains a strong interest in removing artificial barriers to equal employment opportunities and ensuring that employment tests such as the 7004 Exam comply with the requirements of Title VII. As much as this court sympathizes with those test-takers who must bear part of the burden, it is simply not possible to remedy the effects of discrimination without diminishing some interests or expectations. As noted above, defendants rejected proposals that would have abandoned the test results altogether or allowed for the placement of individuals who failed the exam. Since placement on the eligible list still requires a passing mark on both parts of the 7004 Exam, the objectors can at least take some consolation in the fact that their hours of study paid off.[14] Regardless, public perceptions of fairness cannot justify rejecting a proposal that will substantially reduce the adverse impact of the exam. See Bridgeport Guardians, Inc. v. City of Bridgeport, 933 F.2d 1140, 1148 (2d Cir. 1991).

C. Civil Service Law

Approximately forty-seven objectors challenge the Proposed Alternative Use on the ground that it undermines or is contrary to the New York Civil Service Law. For example, some objectors argue that the Proposed Alternative Use violates the Civil Service Law by converting the 7004 Exam from an open competitive examination to a pass-fail examination. Others complain that the Proposed Alternative Use employs a criterion other than test scores – namely race or ethnicity – to establish an eligibility list, or undermines the principles of merit and fitness inherent in the concept of civil service testing. Finally, many object on the ground that the Proposed Alternative Use is inconsistent with the method for selecting applicants for Custodian

[14] Again, however, this court makes no findings as to whether or not the 7004 Exam's minimum pass score is properly validated.

Engineer positions that was published in defendants' Notice of Examination.

These arguments fail because, as noted above and in my previous Memorandum and Order, it is well-settled under federal law that "employees 'do not have a legally protected interest in the mere expectation of appointments which could only be made pursuant to presumptively discriminatory practices,'" and that a person on an eligibility list "'does not possess any mandated right to appointment or any other legally protectable interest.'" New York City Bd. of Educ., 85 F. Supp. 2d at 152 (quoting Kirkland, 711 F.2d at 1126, 1134). Nor does New York State law recognize any vested property right or entitlement to a particular rank based on a score on a civil service exam. See Cassidy v. Municipal Civil Serv. Comm'n, 337 N.E.2d 752, 753-54 (1975).

Even if the objectors could point to some legally cognizible interest under state law, that interest would be pre-empted by federal law. As this court noted in approving the Settlement Agreement in this case, "even if Congress has not expressly pre-empted state law in a given area, a state statute is invalid under the Supremacy Clause of the United States Constitution if it conflicts with federal law or 'stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." New York City Bd. of Educ., 85 F. Supp.2d at 151 (quoting Lawrence County v. Lead-Deadwood School. Dist., 469 U.S. 256, 260 (1985)). Thus, "to the extent that a civil service rule conflicts with the operation of a settlement in a Title VII lawsuit, it is pre-empted by federal law." Id. at 151-52. Indeed, the score-based ranking called for by the civil service law is itself the root cause of the disparate impact that the Proposed Alternative Use seeks to remedy in accordance with federal law. Obviously, the state civil service law cannot take precedence over Title VII's imperative to address that disparate impact.

D. Veterans' Credits

Some objectors have also expressed the fear that randomizing the eligible list will prevent veterans from using their statutory veterans' credits.[15] In fact, defendants have taken veterans' credits into account in constructing the random-order list. (Declaration of Thomas J. Patitucci, dated April 21, 2000, ¶ 5.) Once all of the qualified passers were arranged in order of their random numbers, they were given assigned scores evenly distributed between 60 and 100. Five points or ten points were then added to the scores of those who claimed veterans' or disabled veterans' credits, respectively, and the rankings of all eligibles were rearranged to take those new assigned scores into account. (Id.) This is confirmed by a review of the proposed randomized list, which shows the first five eligibles as having adjusted final scores above 100. Since the highest possible score is 100, a score higher than 100 could only result from the adjustment of an assigned score to add veterans' credits. (Id. ¶ 6.)

E. Remaining Objections

I have reviewed all of the remaining objections, and I find them to be meritless, irrelevant, or beyond the scope of this lawsuit.

Conclusion

In sum, the Proposed Alternative Use represents a compromise entered into by the parties after careful deliberation and negotiation, and as such it is presumptively reasonable. It is not the province of this court to dictate a solution and, even if it were, the court would be hard-pressed to devise an outcome better than the one under review, given the various and competing

[15] Title VII exempts from challenge the application of "any Federal, State, territorial, or local law creating special rights or preferences for veterans." 42 U.S.C. § 2000e-11.

interests and concerns at issue in this case. Under no circumstance would it be possible to please all of the objectors and at the same time address the apparent discriminatory impact of the 7004 Exam. In light of that fact, the parties have agreed on a proposal that aims to improve the positions of black and Hispanic applicants while maintaining standards for safety and competence and curtailing delays as much as possible.

The Proposed Alternative Use and the random order list are hereby approved.

SO ORDERED.

Dated: Brooklyn, New York
September , 2000

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ROBERT M. LEVY
United States Magistrate Judge